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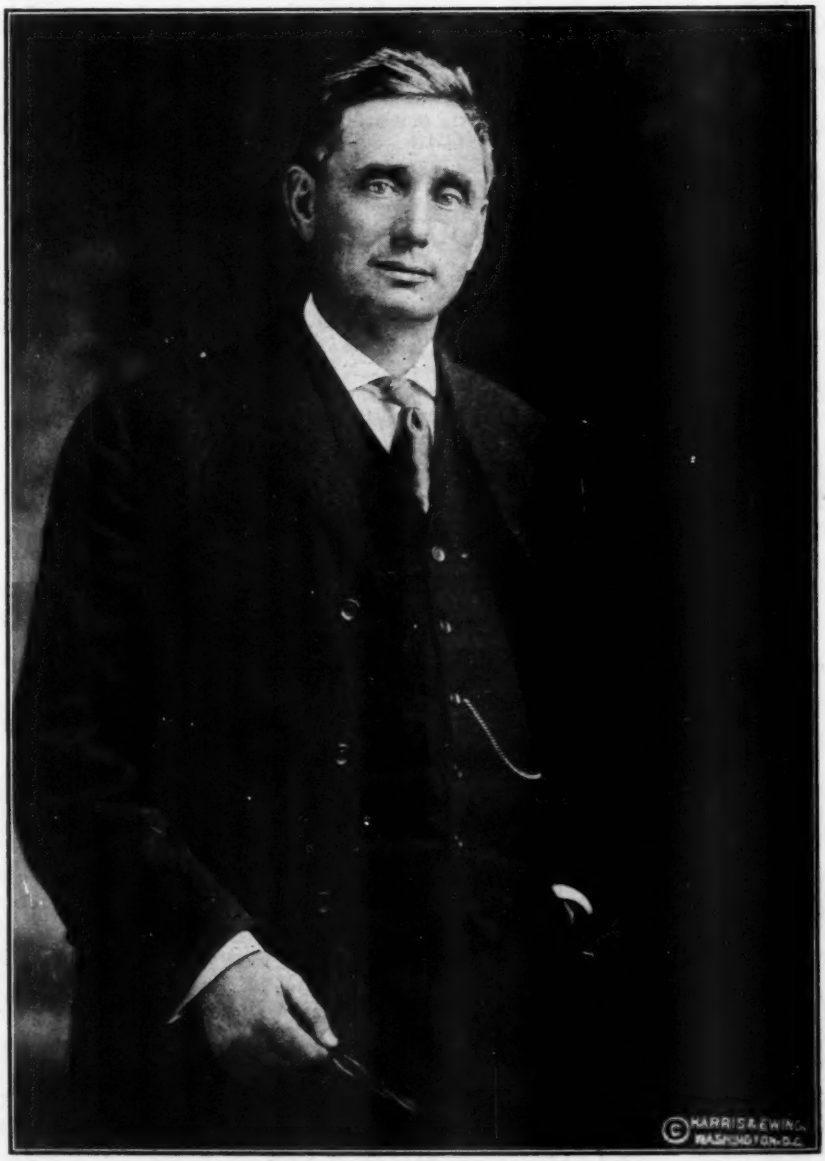

LOUIS D. BRANDEIS,

Associate Justice of United States Supreme Court.

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LOUIS D. BRANDEIS, ASSOCIATE JUSTICE SUPREME COURT OF THE UNITED STATES.

Probably no more popular appointment to the Supreme Bench has ever been made than President Wilson's nomination of Louis D. Brandeis of Boston, which was confirmed by the Senate, June 1, 1916.

Unfortunately for the prestige of the legal profession, many of its leaders were found publicly opposing confirmation, with the result that editorial comment in the public press following confirmation has been anything but flattering to the profession.

Louis Dembitz Brandeis was born at Louisville, Ky., Nov. 13, 1856. He was graduated from the Harvard Law School in 1877 and immediately began the practice of law in Boston. His practice has been lucrative, first as the junior member of the firm of Warren & Brandeis and later as senior member of the firm of Brandeis, Dunbar & Nutter.

Who's Who for 1915 states that the public activities of Mr. Brandeis, which brought him public notoriety, began in 1906 when he began his attacks upon the New Haven monopoly. Thereafter followed in rapid succession his appearance for Mr. Glavis in the Ballinger-Pinchot investigation; his appearance in behalf of shippers in the advanced freight rate investigation before the Interstate Commerce Commission; and his appearance as counsel for the people in proceedings involving the constitutionality of Oregon and Illinois women's ten-hour law. His settlement of the New York Garment Workers' strike in 1910 increased his popularity, and his report as chairman of the arbitration board displayed thorough understanding of the conditions under which that business was conducted.

It was these public activities of Mr. Brandeis which were the cause of both his popularity with the people and his unpopularity with certain business interests. "Ten years ago," says the New York Evening *World*, "the nomination of Mr. Brandeis to public office would have been received with universal favor. He had been graduated with great honor at the Harvard Law School. In 1890 he was made a member of the committee appointed by the Board of Overseers of Harvard University to visit the Law School and, indeed, has been continued in that position ever since that time, and in 1895 he was elected to honorary membership in the Phi Beta Kappa. These honors would not have been conferred upon him had not his reputation at that time been conspicuously good."

There can be no doubt that few lawyers in this country are intellectually better qualified for the performance of the duties of supreme judge than Mr. Brandeis. With a keen, analytical mind which goes right to the heart of a problem, he should be able greatly to assist the court in getting at the important issues of a case. He is a great diagnostician of legal and sociological problems and everyone who has read his books is enthusiastic over the perspicuity of style and argument that reduces the most abstruse problems to the simplest terms.

Mr. Brandeis will greatly increase the prestige of the highest court in the world. Beside being, according to the late Chief Justice Fuller, one of the keenest legal minds that ever practiced before that tribunal, he is a man in deep sympathy with the needs of the people who toil. His practice has frequently led him to oppose corporate wealth and vested interests, in seeking to procure justice for those who demanded a larger share of the wealth they had created and greater comforts in the duration and conditions of their daily labor. Mr. Brandeis has also been known as the champion of public rights as against the great public service corporations and here again he has accomplished much.

But in spite of the apparently radical ideas of Mr. Brandeis, he is no demagogue. He has never sought public preferment and what public service he has rendered has not

only been born of sincere convictions, but has been tempered by his careful regard for the rights of others. Mr. Brandeis never permitted the apparent or superficial logic of his contentions to carry him to extremes; he never exaggerated. For this very reason he became the most dangerous opponent of those who sought to hide their schemes to rob the public behind approved institutions of commerce such as our great railroad systems. On the other hand, the great public service corporations who are trying honestly to serve the public and to secure legitimate returns on their investment should find in Judge Brandeis a powerful protector and friend.

The country is to be congratulated that after an ordeal that few men could have stood so successfully, the nomination of Mr. Brandeis has at last been confirmed. Any other result would have been a public misfortune, since it would have aroused suspicion, however untrue and unfair such suspicion might have been, that big business and ultra-conservatism had succeeded in defeating a man whose only offense seemed to be that he had espoused the public interests too ardently.

A. H. R.

NOTES OF IMPORTANT DECISIONS.

COMMERCE—NOTICE OF LOSS TO INITIAL OR CONNECTING CARRIER. — In Northern Pac. Ry. Co. v. Wall, 36 Sup. Ct. 493, it was held that where it was stipulated in a bill of lading for a through shipment, that notice of loss was to be given to "said railroad," meaning, literally, the initial carrier, as a condition precedent to the bringing an action for loss or damage to the shipment, this meant notice either to it or the connecting carrier.

The Supreme Court of Montana had held that the requirement of the stipulation for notice to an agent of the initial carrier, was unreasonable, as it had no agent at the point of destination and plaintiff, therefore, was not bound to comply.

The Federal Supreme Court said: "It seems plain that the stipulation (in the bill of lading) meant and contemplated that the notice might be given at the place of destination to an officer or agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose, and gives due effect to the statute under which it was issued. True, the words 'said carrier' in the stipulation, if read only in connection with an introductory sentence in the bill of lading, would seem to refer to the initial carrier alone, but when they are read in connection with the statute and other parts of the bill of lading, including the provision that its terms and provisions 'shall inure to the benefit of' any connecting carrier, it is apparent that they embrace the carrier making the delivery as well as the initial carrier, especially as the former is, in legal contemplation, the agent of the latter."

This decision is important, chiefly as showing an exception to the rule of printed contracts, and especially those of carriers, as to whom the courts have ruled individuals of the public do not deal with them at arm's length, and they are construed most strongly against the proposers of the contracts.

Justice McReynolds, with whom concurred Justice McKenna, dissented from the conclusion, among other grounds on that above noticed, and he thought that the bill of lading followed an old form adopted prior to the Carmack amendment and its construction was not to be influenced thereby.

On its face, the bill of lading seems unambiguous, and there is no doubt it could serve as well for the benefit of a connecting as an initial carrier, but it would not protect either as fully as were the notice to be given to the latter, as the deliverer at destination.

BILLS AND NOTES—QUALIFYING WORDS AFECTING NEGOTIABILITY.—In Snelling State Bank v. Clasen, 157 N. W. 643, decided by Minnesota Supreme Court, a brand new question seems suggested. While many cases are cited in the opinion of the court, none seems to embrace the precise facts involved.

In this case the note in question was, on its face, in perfect form as a negotiable instrument. On the back of the note and above the name of payee's indorsement appeared the words, "As per contract." There was an agreement between original parties for a rescission and return of the note at the option of maker in a certain contingency.

The court very rightly held, we think, that the delivery of the note was not conditional, but the question remained, whether the words "as per contract" affected negotiability.

Several cases are instanced of words not giving notice of possible references to a collateral

agreement, but none with the precise words in this note. The nearest case we find is a recital on the face of the note, "Value received as per contract," but we think the words "value received" differentiate the two cases. Natl. Bank v. Wentworth, 218 Mass. 30, 105 N. E. 626. The same may be said where the words inserted were "on account of contract." Bank v. Lightner, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, 11 Ann. Cas. 596.

These statements could only mean a notation for the benefit of the maker as between him and payee so far as possible dispute might arise. There is a plain admission of the sufficiency of the contract as a consideration. Simply, however, to say, "per contract," is ambiguous, to say the least. It leaves something open to be inquired about, and its place on the note is to give notice to others. It is not an expression of satisfaction with the consideration, in an absolute way.

But does the placing of these words on the back of the note make any difference, so far as subsequent purchasers are concerned? If there for a purpose, who could be affected? Certainly if one takes with notice of a condition to absolute liability, he is not a purchaser for value free from defenses. The indorsement of these words to have any effect at all must carry some obligation of inquiry. The very fact of an indorsement having any super-added words itself challenges inquiry. It is laid down, that the only thing necessary is to indorse a name and the law deduces the result. If you add to this, a purpose must be presumed.

THE BANK AS A COLLECTING AGENT—DUE CARE IN THE SELECTION.

The activities of the modern bank differ widely from activities exercised by the old time banker. The banker of thirty or forty years ago was a banker in the strict sense of the word; viz., he received deposits and made loans. Modern banking activity, however, necessarily entails the performance of duties which were negligible some years back.

The particular activity of a bank that has risen to an important plane during the last fifteen or twenty years, and which is constantly assuming more important proportions, is the collecting of negotiable paper for its clientele, particularly the collection of the check. This is due to the increasing popularity of the check as a medium of payment and of the growth in the domestic business of the United States. In fact, the average small deposit almost always includes an out-of-town item and the deposits of the manufacturing, mercantile and other large business enterprises are largely made up of checks, payable at a place other than in the city or town where deposited.

To effect the collection of such a volume of business is quite a practical problem and necessitates the establishment of separate departments in most banks for taking care of the same.[1]

The legal question involved, however, is this: what agency shall the bank (with which the check is deposited) use to collect the instrument so as to guard itself from liability in the event of the failure of the agent to duly collect or account for same? Prior to considering this question it is important to determine a further inquiry; viz., In what branch of the law does this inquiry arise? Do the rules of negotiable instruments apply or do the rules of agency govern the case? The distinction between the bank as a holder, and the bank as an agent is a vital one and fraught with difference as to the legal liability entailed.

To illustrate: A bank receives a check payable to and endorsed by X in payment of an obligation owing to the A bank. The instrument is drawn on the Z bank of Joliet, Illinois. The check is sent to the Y bank of Joliet for collection, and is duly presented and proceeds paid to the Y bank which fails without remitting the amount collected.

If the relationship between X and the bank be that of endorser and holder X is discharged, as the ordinary steps necessary to charge an endorser have not been taken, and, furthermore, as to the drawer, the instrument is paid.[2] In either view of the situation the loss falls upon a bank. However, if the legal relationship be that of principal and agent, the bank as agent can

(1) The Federal Reserve Act recognizes the importance of this branch of a bank's activity.
(2) The correct view.

contend, with some show of reason, that to perform the service of collecting, it was necessary in turn to choose a sub-agent and that the selection was made with due care and, therefore, it is absolved from any liability.

The Bank as a Holder.—The pertinent question is this: When the bank gives the depositor credit for an out-of-town check, has it become a purchaser thereof in the accepted use of the word?[3] In Hobart National Bank v. McMurraugh (103 Pac. 601) the court said:

"When the endorser (McMurraugh) received credit for the check, the bank became indebted to him in a sum equal to the amount of the credit. The check itself became the property of the endorsee (Hobart National Bank) and the endorser's relation to it became that of one who had transferred title to it by endorsement. If the bank did not intend to accept the check as money, it should have entered it as paper and not as cash, or otherwise should have made manifest its intention to collect merely."

And in Brown v. People's Bank (52 So. 719) the court said:

"By the endorsement and delivery of the check the depositor engaged that on due presentation, the check would be paid, and if not honored and the necessary proceedings on dishonor be duly taken, that he would pay the amount, to the holder of the check."

And in Strong v. King (35 Ill. 9) the court said by way of dictum:

"If a banker receives a check and gives the depositor credit therefor, the check from that time becomes the absolute property of the banker with whom it is deposited. But the depositor of a check may as well employ his banker as an agent to collect it as any other person, and if the depositor deposits the check with his banker for collection, such deposit is precisely the same in its legal effect, as handing the check to a messenger for the same purpose."

A bank, therefore, to establish its position as an agent and not as a holder, should (agreeably to the suggestions noted in the preceding decisions) inform its depositor to that effect. A stipulation to the following effect will suffice:

"Checks deposited for credit are taken at the risk of the depositor. This bank will assume no responsibility for neglect or default of collecting agents."[4]

The notice may be printed on deposit tickets or in a pass book. This is not, however, a certain method of bringing the notice home to the depositor. The only posi-

(3) A bank frequently is the owner of negotiable instruments in its own right. For instance, as the buyer of commercial paper in the market, discounting, etc. Except under exceptional circumstances, the question of due care in selecting an agent to effect collection of such instruments will not arise. The bank is in no sense an agent. In practice the ordinary discount stands on a different footing from a check. Therefore it may be fairly stated that the bank becomes a holder of such paper and not an agent, although such discount were credited to a customer's account and the ordinary stipulation as to not being liable for agent's acts was present. Such stipulation it seems should be specially noted in reference to a discount. Furthermore, it would seem that if a bank cash a check for someone not a customer, the bank would become a holder of such item, unless the fact of agency were specially noted.

The ordinary situation under discussion assumes a general indorsement and not one for collection, etc. The general practice in the banking field is to insist on the general indorsement. To this effect is the rule of the Chicago Clearing House, and other prominent clearing house associations.

In some jurisdictions no combination of circumstances makes the bank with which the item is deposited, the holder thereof, irrespective of whether credit is given or not, or whether or not there is any stipulation inserted in the contract between the depositor and the bank, that the relationship is that of principal and agent. Bank v. Hendrix, 147 Ala. 670.

(4) The stipulation inserted should also take notice of the Federal rule (noted post), viz., expressly agree not to be liable for acts of subagents. This fact is important because of the likelihood of the action getting into the Federal courts, where the court under the principle of Swift v. Tyson, 16 Peters 1x, will recognize its own rulings.

The law of the particular jurisdiction, if the suit were in the state court, would be the law of the state, as between the plaintiff and the defendant, where the deposit was made. Thus, if in Ohio, deposit with the B bank in New York, which forwards the item to C bank in Illinois, which, in turn, forwards it to Missouri, the place of payment; and the suit were between B and C, the Illinois law would govern. Bank v. Bank, 221 Ill. 319.

For a general discussion on the conflict of laws, see Seelove on Banking, No. 6.

A stipulation purporting to allow the sending of items to the drawee bank might be sustained. It has, however, the appearance of contracting to avoid the effect of the negligence in selecting a subagent and might like other stipulations to avoid the effect of negligence, be held void.

tive method is to have the stipulation inserted in the signature card of the depositor at the time the account is opened. A pass book may not be given to the depositor and he may not use the ordinary deposit tickets.

The Bank as an Agent.—On the assumption that a bank has established its status as that of an agent, the further question remains: Can a bank by exercising due care in the selection of its agent, divest itself of liability?

The Federal rule on this point is an answer in the negative with certain qualifications. The rule is illustrated by Bank v. Bank (190 Fed. 318). In that case:

The California National Bank, Sacramento, forwarded an item on Ponderay, Idaho, to the Utah National Bank of Salt Lake City, who, in turn, forwarded it to their correspondent at Ponderay. Through the negligence of the Ponderay Bank, the California National Bank lost all recourse against prior parties and sought to hold the Utah National Bank liable, contending it was responsible for the act of its agent at Ponderay.

The court said:

"In the absence of expressed or implied contract that it should not be liable for the misconduct of its sub-agents, we would be required under the authority of Exchange National Bank v. Third National Bank (112 U. S. 276) to hold the defendant responsible for the negligence of the agents employed by it."

But the court notes that as the Utah National Bank had incorporated in its receipt to the California National Bank, the following stipulation:

"In receiving checks and other paper on deposit or for collection, the Utah National Bank acts as agent, and assumes no responsibility for the acts, omissions, neglect or default of agents or sub-agents at other points."

The case comes within the exception of the ruling of the case cited; and that the Utah National Bank is not liable unless it negligently selects a sub-agent. The reasoning of the federal rule is that:

"The bank necessarily had far better opportunities to know of the safest agencies for the collection of the check and it made its own selection of its agents without reference to the depositor."

The General Rule.—The general rule which obtains in the United States is, however, different from the rule noted, and is simply expressed. That the collecting bank is liable for the act or default of its sub-agent only if it has been negligent in its selection.[5] Thus in Insurance Co. v. Bank (25 Ill. 221) the planitiff deposited a check for collection with the defendant drawn on the Citizens Savings Bank, St. Louis. The plaintiff sent the check to Benoist & Co., bankers of responsibility in St. Louis who failed to protest the check at the time of dishonor, discharging several endorsers in consequence thereof. The court in holding for the defendant stated:

"The bank fully discharged its duty by sending the instrument in due season to a competent, reliable agent with proper instructions for its collection."

A further distinction of fact is noted in Milling Co. v. Kuenster (158 Ill. 261). In that case the plaintiff deposited for collection with the defendant, a draft drawn on M. J. Heyer, Wilmington, N. C. The defendant forwarded the draft to the First National Bank, Wilmington (the only bank in the town) which collected the proceeds and failed without remitting. The court said:

"The defendant fully discharged its duty by transmitting the draft in due season to a suitable agent at the place of residence of the drawee with necessary instructions and it is not liable for loss occasioned by the negligence or default of the collecting agent thus employed. Such collecting agent becomes the agent of the holder of the draft and not of the bank with which it is deposited for collection."

The rationale of the rule is usually expressed thus:

(5) The question of due care in the selection of an agent is frequently confused with the question of circuitous routing. The question of circuitous routing is one of the law of negotiable instruments, to-wit: A reasonably direct route must be used to forward the instrument for collection, so as to safeguard the interests of persons secondarily liable. Gifford v. Hardell, 88 Wis. 538.

"When a customer deposits with a bank, a note, bill of exchange, certificate of deposit, check, etc., for collection, at a point distant from the location of the bank, he must know that the bank cannot send one of its officers or agents to make the collection. He is presumed to know the method employed by banks in making such collections. He knows that the bank must select some other bank or agency to effect this purpose. He has employed the bank to do, through its method of making collections, that which would cost him much money to do himself."

In Missouri, a somewhat peculiar distinction obtains, although the general rule is recognized. The case in which the point arose is that of Landa v. Traders Bank (Court of Appeals, 1906). In that case the plaintiff deposited his draft on the United States Brewing Company of Chicago, with the defendant for collection, under an arrangement whereby the plaintiff was to pay 10 per cent per $100.00 as a collection fee. The defendant's correspondent in Chicago, surrendered the bill-of-lading upon receiving a worthless check.

The court held for the plaintiff, although the Chicago correspondent was selected with due care:

"The distinction is clear where an agent for a consideration agrees to collect a bill of exchange and he employs another agent for the purpose, and where he simply accepts one for collection without any agreement for a consideration and employs another agent for the purpose. In the former instance the act of the sub-agent is the act of the original agent and not of the principal. In the latter instance, the sub-agent is the agent of the principal, and not of the original agent. It is insisted, however, that the consideration the plaintiff agreed to pay the defendant was a mere nominal consideration. It is true the consideration was not great, but we are not to conclude for that reason it was only nominal. It was the express consideration and in the absence of proof to the contrary, the presumption is that it was sufficient and customary."[6]

The court goes on further to state in substance:

"That the printed stipulation in the pass-book that the bank is not liable for the acts of the sub-agent will not change the rule, as the stipulation is subordinated to the contract for the consideration. The stipulation should be inserted in the arrangement for the payment of the exchange."

Due Care in the Selecting of a Sub-agent.—In the cases noted the very clear rule was announced, that if a check or draft is sent to some responsible bank other than the drawee bank, such selection is a matter of law, the exercise of due care. Furthermore if the instrument be drawn on an individual, and there be only one bank at the place of payment which is responsible, the item may with safety be sent to that bank. The above rules are not open to exception.[6a]

The more difficult question, however, is the one in which the sub-agent selected is the one who is called upon to pay the instrument. Is this selection not due care as a matter of law, or may the worth and responsibility of the sub-agent be inquired into?

As the question has arisen in litigation, it is fraught with nice distinction, the first classification being thus:

(1) Those cases in which there is only *one* bank in the town in which the instrument is payable and

a. The instrument is one that is drawn on but *is not* the primary obligation of the bank to which it is sent, and upon which instrument there are no persons secondarily liable to the depositor.

The only late decision ruling squarely on the point is that of Kershaw v. Ladd and Tilton (56 Pac. 402).[7] In that case plaintiff

(6) A special agreement relative to exchange is contemplated. The ordinary exchange rate fixed by the various clearing houses or the rate usually charged the clientele is by fair inference excepted from the ruling.

The del credere doctrine noted in the principle case has not had a full expression in the United States. It seems, however, to be a sound one.

(6a) Insurance v. Bank, 25 Ill. 221; Milling Co. v. Kuenster, 158 Ill. 261.

(7) The court by way of dictum touches on a supplementary rule; viz., the necessity for tracing up an item sent for collection; although, as a matter of fact, the agent has been selected with due care. "The collecting bank not having received payment of the check by return mail

drew his check on the U. S. Banking Co. located at Sheridan, Ore., the only bank there. The plaintiff deposited the item with the defendant who forwarded it for collection directly to the drawee,[8] who failed without remitting. The liability of the defendant arose on the question of submitting evidence proving a custom, whereby items were sent directly to the bank who was to make payment, if that bank were the only one in the town. Such custom was duly proved. The court, in commenting generally upon the situation, stated:

"When the collecting bank makes the drawee bank its agent for presentment, protest, demand and giving notice of nonpayment to the endorsers, if any, and the drawee, the duties thus devolving upon such an agent are inconsistent and incapable of being performed by the drawees of the check, as it is said he cannot present a demand to himself, or demand payment of himself, much less protest his own paper and give notice to proper parties that he has refused payment."

But the court went on to say in referring to the custom of sending items to the drawee when it was the only bank in the town, with the result of holding such selection due care:

"Upon principle it would seem that the usage is not unreasonable, in so far at least as it may apply to the collection of a *plain unendorsed* check."

In the absence of the custom, the ruling probably would have been the other way; viz., negligence *per se* in the selection of the sub-agent.

The Second Class of Cases.—In the second class of cases a definite rule is developed; viz., where

(2) There is only one bank in the town in which the instrument is payable and

a. The instrument *is one* which *is* the primary obligation[9] of the bank to which it is sent and upon which instrument there are no persons secondarily liable to the depositor.[10]

The leading case on this point and one which is often cited wtih approval by the courts, is Anglo Packing Co. v. Drovers National Bank (117 Ill. 100). In that case the plaintiff deposited with the defendant a certified check[11] payable to their order, drawn on Rice and Messmore, Cadillac, Mich. The defendant forwarded the check to Rice and Messmore, the only bank in the

(having regard for the business hours of the bank and the arrival and departure of the mails), should have treated the check as dishonored and notified Kershaw thereof by the following mail, or at least by the mail of the following day, so he could have brought action for the recovery of his deposit. If a check of the drawee be received in payment and dishonored, notice of that fact should be given to the depositor within the time noted."

If the average bank were to follow such a rule, it would find itself confronted with a physically impossible task. The ordinary practice would unquestionably be found to be the legal definition of due care in tracing. Briefly, such practice is to trace unpaid items according to the time usually occupied in effecting payment, not in watching the train time of every town. If no reply is received from the tracer, or reply is insufficient, the depositor is duly notified. In accordance with the practice noted, see Bank v. Bank, 65 S. W. 4.

(8) It must be understood that the plaintiff had funds on deposit with the drawee sufficient to cover the check, otherwise the action would be untenable.

(9) It should be noted, however, that if an item has been traced and a reply is overdue for any length of time, it is negligence per se to send an item to the same bank; and this is true whether or not the selection in the first instance was made with due diligence. Bank v. Bank 65 S. W. 4.

(10) Other forms of primary liability are the cashier's checks, certificates of deposit, margins, etc.

(11) There are some instruments concerning which there might arise a doubt as to whether they are drawn on the bank to which they are sent. To illustrate: (1) A draft drawn by the X Mfg. Co., payable at the First National Bank, Joliet, Ill.; or (2) A note or acceptance of the X Mfg. Co., payable at the First National Bank, Joliet, Ill. In the first class of cases, it would seem that the item could with safety be sent to the First National Bank of Joliet. The only question to determine being, is the Joliet bank a responsible institution? There is enough intimation in the cases, however, that instruments in the second class are on a parity with checks drawn on the First National Bank, Joliet, for the purpose of determining whether an agent has been selected with due care. It seems logical that they should be so considered, as the bank can charge them to the account of the maker.

In a Kentucky decision, however, Bank v. Bank, 65 S. W. 4, the court held it was not negligence per se to send a note for collection to the bank at which it was payable, although the treasurer of the maker of the note was cashier of the bank to which is was sent, which was known, and, further, that the note had several indorsers thereon. A very extreme case.

town, who received the item and failed three days later without having paid therefor. The court held the defendant liable, stating:

"How then can he who is debtor be at the same time and in respect of the same debt, the interested agent of the creditor. Can it be said to be reasonable care in selecting an agent, one known to be interested against the principal; to place the principal entirely in the hands of his adversary. The interest of the creditor when his debt is failing, is that steps be taken promptly and prosecuted with vigor to collect his debt. But at such a time the inclination of the debtor quite often and it may be sometimes his interest, too, is to procrastinate. Surely it could not be held reasonable care and diligence in an agent holding for collection the promissory note given by one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidence of indebtedness and repudiate the transaction as his conscience might permit. If this would not be held to be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?"

The court[12] touched by way of dictum upon the custom prevailing in certain communities; viz., sending the items direct to the drawee bank, if such were the only bank in the town or the only bank of good standing there; that such custom "does not include cases in which certified checks are sent for collection to the bank by which they are certified."[13]

A somewhat novel point was raised by the depositor in Wilson v. Carlinville National Bank (187 Ill. 222). In that case the plaintiff deposited with the defendant a check drawn on the Bank of Gillespie, the only bank in Gillespie. The defendant forwarded the item to its St. Louis correspondent who in turn forwarded it through various channels directly to the drawee, which failed without paying.

The plaintiff contended that although the defendant did not send the item to the drawee, it knew that its St. Louis correspondent would do so, hence it is the same as selecting an agent without due care. The court denied the contention, stating:

"It was immaterial if the defendant knew that the item would be sent direct to the drawee; as long as it did not interfere with the discretion of the St. Louis correspondent in the selecting of any sub-agent which the St. Louis bank might choose."

The question of interfering with the discretion in the selecting of a sub-agent was taken up by the court in the case of Bank of Whittier v. First National Bank (221 Ill. 319). In that case the plaintiff forwarded to the defendant a certificate of deposit on D. F. Parsons, Burr Oak, Mich. D. F. Parsons was the only bank in Burr Oak. The defendant forwarded the item to the Citizens State Bank, Detroit, with instructions to forward to Burr Oak, viz., to send to its correspondent there, not naming bank, this being done to receive a better rate of exchange. The Detroit bank forwarded the item as directed, Parsons failing before remitting for the same. The court denied that the rule of the Carlinville case (ante) applied, stating:

"The evidence tends to snow that the First National Bank did interfere with the discretion of the sub-agent by giving him what amounted to an instruction to send the certificate for collection to the maker thereof."

The Matter of Damages.—The amount of damages to be recovered in the event of the carelessness in the selection of a sub-agent, is not altogether free from doubt. However, in the situation where the item is the primary obligation of the bank to which it is sent, such as the certified check, cashier's check, certificate of deposit, etc., the majority rule states that the amount to be recovered is the amount of the item without any further steps

(12) A further fact deemed immaterial was, that if the item had been forwarded through channels of due care, the item would have been presented after the failure of the subagent, Rice and Messmore, leaving the plaintiffs in the same situation as they are now in.

(13) In large cities, the custom prevails of forwarding for collection items drawn on outlying banks located in the same city. The custom is so general that the discussion pertaining to out-of-town banks is equally as applicable in reference to the outlying city bank, viz., the use of due care in selecting an agent.

being necessary; although there be no persons secondarily liable antecedent to the depositor. Not so, however, is the rule of Hendrix v. Jefferson County Savings Bank (147 Ala. 670).

Minority Rule.—In that case the plaintiff deposited a cashier's check payable to his order drawn by the Shelby Co. Bank with the defendant, who forwarded it to the Shelby Co. Bank, who failed without remitting.

Under this showing of fact, the case was remanded, the court stating:

"Prima facie, at least, it is negligence in a collecting bank to send the check to be collected by mail or otherwise directly to the drawee bank for payment, especially when the paper is a cashier's check. If the bank fails to collect it, through fault of its own, it is liable to the holder for all damages sustained by him through such failure But the damages recoverable are by no means necessarily the amount of the check. It by no means follows from the negligent failure of the bank to collect the check, or its negligent failure to give the owner timely notice of the dishonor of the check, whereby he is denied fruitful opportunity to collect it himself, that the owner loses the demand for which the check was given, or even any part of it. To the contrary, it is frequently, if not generally true, that the owner of the paper secures some part or all of the debt for which it was given in some other way, as by subsequent voluntary payment or by suit against the maker or drawee bank, when it is solvent, or by dividends upon its being wound up as an insolvent concern. It will not therefore suffice for the owner to hale the collecting bank into court and implead:

" 'You took this check to collect it; you did not do your duty in that regard, and of a consequence the check was not collected; therefore the check is yours and the amount of the money is mine, and in your hands for me, and you must pay me that amount.' "[14]

The case came up again on appeal (153 Ala. 636) and the court finally rounded up the doctrine, viz:

"The depositor must, if the bank be insolvent prove up his claim against the defunct institution, and after receiving his dividends, may recover from the defendant, the difference between the dividend received and the face of the check."

Third Class of Cases.—The third class of cases are those in which the obligation is the primary obligation of the bank to which it is sent (as the certificate of deposit, cashier's check, etc.) and upon which there are persons secondarily liable to the plaintiff.

In a jurisdiction which purported to follow the ruling of the Hendrix case (ante) viz: that the plaintiff must exhaust his remedies against the sub-agent before having recourse against the defendant, the fact that solvent endorsers were discharged by the negligence of the defendant, might be one of importance and waive the necessity of the particular steps necessary by the plaintiff against the sub-agent. The question is, however, one of doubt.

As noted in the previous decisions, the presence of the endorsers will not change the general rule; the fact of a discharged endorser will only strengthen it. (Bank v. Bank, 221 Ill. 319.)

If, however, the obligation be not the primary obligation of the bank to which it is sent, as a check drawn on it, the presence of endorsers who had endorsed generally, or even a drawer who had negotiated the instrument, is apt to be a fact of moment. Under the ruling of Kershaw v. Ladd & Tilton (ante) it is a fair inference to state that no evidence as to a custom of sending direct to the drawee would be admissible. A North Carolina decision (Bank v. Floyd, 142 N. C. 187) has clearly held the custom unreasonable. In accord with Bank v. Floyd[15] the general run of decisions would unquestionably hold the selection

(14) The case goes pretty far, viz., it is immaterial that the plaintiff could have presented the item before the bank had suspended payment, if the defendant had had promptly notified him of the non-failure of the subagent to promptly take care of the obligation.

(15) The facts in this case are rather strong, only one bank in the town, and the defendant's correspondent at that.

of the drawee under the circumstances noted, a negligent selection *per se*.[16]

The question would still be an open one under the doctrine of the Hendrix case. Must the plaintiff first exhaust his remedy against the drawer? Probably he would have to do so.

F. THULIN.

Chicago, Ill.

(16) Obviously, if there be some other bank in good standing in the town or city of the bank on which the item is drawn, it is negligence per se to send the item to the bank who is to pay the same. The proposition is so well known that it does not need the citation of authorities. Furthermore, the proposition would be true although there were no indorsers antecedent to the depositor. Any custom which sought to change this would be clearly unreasonable. The presence of indorsers would be very important if the bank selected were irresponsible, but was not the drawee bank. Thus, if X deposited a check payable to his order with the Z bank, drawn on the Y bank, and the Z bank sends the check to the A bank, who fails without having collected the item, the check, as to to the drawer, is not paid. The question remains, what is the effect of the delay in not giving notice, or to duly present the check? Under the rules of Negotiable Instruments Law, the drawer of the check is not discharged unless actually prejudiced by the failure to duly notify him. Thus, X is in the same position as before, i. e., uninjured. If, however, there be persons secondarily liable to X (other than the drawer) who are discharged as an ordinary indorser would be, by the delay or failure to present in due season, the Z bank would clearly be liable to the depositor. Ins. Co. v. Bank, 25 Ill. 221.

INJUNCTION—LIBEL AND SLANDER.

WOLF v. HARRIS.

Supreme Court of Missouri, Division No. 2. March 31, 1916.

184 S. W. 1139.

Where a party libeled secures a judgment at law against the libeler, which, owing to the latter's insolvency, he cannot collect, he can enjoin in equity further publication of a libel of like import.

Respondent herein, who was plaintiff below, brought this action in equity in the Circuit Court of Jackson County to perpetually restrain and enjoin defendant from publishing certain alleged false, defamatory, and libelous statements concerning respondent. From a judgment for plaintiff enjoining defendant as prayed, the latter appealed.

The case turns on the application to plaintiff's petition of § 14 of Art. 2 of the Constitution of Missouri, which section is pleaded by defendant in his answer. This petition is lengthy, and we do not deem it necessary to set it out in haec verba, but will content ourselves with stating the substance of it. It may help toward an understanding of the case to say that the petition sounds in equity only, and contains but one count.

The plaintiff, after averring that he is a practicing physician and surgeon in Kansas City, Mo., and that he has been such for nearly a quarter of a century, and reciting the extent of his studies, practice, and experience, avers that he was called to treat a young daughter of defendant, and, though exercising in that behalf the utmost care and skill, the patient, without fault of plaintiff, died; that thereafter defendant demanded of plaintiff in divers ways and at divers times and places the sum of $10,000 because of the death of said patient, and threatened that, unless said sum was paid, defendant, by circulating charges of criminal negligence of plaintiff in connection with the death of the patient aforesaid, would destroy the reputation, business and professional standing and income of plaintiff, which plaintiff avers to be lucrative and large, and that in pursuance of said threats defendant circulated and published more than 1,000 copies of a certain false and libelous writing concerning plaintiff. This writing is set out in the petition, and is, if untrue, manifestly libelous.

It is further alleged that thereafter defendant, with the same malicious intent and design, published and circulated among plaintiff's patients, friends and acquaintances more than 5,000 copies of a certain pamphlet in which were repeated the same or similar false, defamatory and libelous statements, and that subsequently defendant procured the printing of a large placard, likewise containing false and libelous statements concerning the plaintiff, and that all this was done for the purpose of wrongfully extorting from plaintiff the said sum of $10,000.

Plaintiff further alleged that all charges so made by defendant touching the wrongdoing and alleged malpractice of plaintiff were false, and were known by defendant to be false, and that they were made and circulated solely to gratify the spite and ill will of defendant against plaintiff and for the purpose of extorting money from plaintiff.

It is further alleged that defendant threatens to continue, and until and unless restrained and enjoined will continue, to print, publish and circulate the same or similar libelous

statements touching plaintiff; that, if plaintiff has any property, the same is so wholly incumbered and covered up, and so insufficient in quantity and value that plaintiff would be unable to collect any judgment which might be rendered in his favor as damages in any action at law that plaintiff might bring on account of the publication of said libelous statements; that, if he were to sue defendant on each successive libelous publication, he would be compelled to bring a multiplicity of actions at law, at great cost, inconvenience, and expense, and that said actions would be so numerous and would for that so incumber the dockets of the courts of Jackson County as to obstruct the administration of justice therein, and so by reason of the premises plaintiff avers that he has no adequate remedy at law and is compelled to resort to his action in equity.

The prayer for relief is substantially followed in the decree as first above stated; that is to say, that defendant be perpetually restrained and enjoined from printing or publishing, or attempting so to do, the false, defamatory and libelous statements aforesaid, or any others of like or similar import.

There are set forth in the abstract the petition in full and the answer of the defendant invoking § 14 of Art. 2 of our Constitution. One point in his brief keeps alive this contention, that an absolute defense is afforded him by the Constitution. Another point urges that "under the allegations of the petition plaintiff had no right to injunction against the defendant." We will treat these points thus coupled together, as we have the right to do under authority, as an attack upon the sufficiency of the petition; for, where a petition states no facts upon which a judgment may be bottomed—in short, where it states no cause of action—that point may be raised here for the first time. Sexton v. Metropolitan Street Railway Co., 245, 149 S. W. 21; Monmouth College v. Dockery, 341 Mo. 522, 145 S. W. 785.

Coming then to a consideration of this contention, we are constrained to hold that the point is well taken; that the petition states no cause of action, because injunction (when, as here, that is the sole relief prayed for) will not lie to restrain the threatened publication of either a libel or a slander. Any other view overlooks the spirit, if not the letter, of the Constitution (§ 14, Art. 2, Const. 1875), which substantially guarantees to the citizen the privilege of saying, writing and publishing whatever he desires on any matter, subject only to liability (either civil or criminal, or both) for any abuse of that privilege. So far, it could not be said with any certainty from the bare language set forth that an abuse of the liberty so guaranteed, when such abuse is so flagrantly present as is conceded by the appellant's brief to be the fact here, could not be remedied by injunction. If the Constitution had stopped with this, we might well say that such a remedy lies. But this section continues:

"In all suits and prosecutions for libel the truth thereof may be given in evidence and the jury, under the direction of the court, shall determine the law and the fact."

It follows that, if the statements made are true, the appellant is permitted to publish them when and where and as often as he will, and that he is entitled to a jury of his country to determine whether the statements are true or false. That the statements on which this action is bottomed seem upon their face to be malicious and obviously untrue does not change the case. It has been so often ruled that in a plain case of slander of the person or slander of title injunction will not lie that reiteration should be unnecessary. Flint v. Hutchinson Smoke Burner Co., 110 Mo. loc. cit. 500, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476; Life Association v. Boogher, 3 Mo. App. 173; Thummel v. Holden, 149 Mo. loc. cit. 685, 51 S. W. 404; Clothing Co. v. Watson, 168 Mo. loc. cit. 148, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; § 14, Art. 2, Const. 1875; American Malting Co. v. Keitel, 209 Fed. 356, 126 C. C. A. 277. In the case of Flint v. Hutchinson, etc., Co., supra, 110 Mo., at page 806, 16 L. R. A. 243, 33 Am. St. Rep. 476, Black, J., speaking for this court, said:

"We live under a written Constitution which declares that the right of a trial by jury shall remain inviolate; and the question of libel or no libel, slander or no slander, is one for a jury to determine. Such was certainly the settled law when the various Constitutions of this State were adopted, and it is all-important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen, the law furnishes a remedy. In view of these considerations a court of equity has no power to restrain a slander or libel; and it can make no difference whether the words are spoken of a person or his title to property. In either case it is for a jury to first determine the question of slander or libel in an action at law. This, we conclude, is the result of the better cases in this country and in England."

The facts before us lacking the element of conspiracy obviously distinguish the instant case from the case of Lohse Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, 128 Am. St. Rep.

499, and from the case of Shoemaker v. South Bend Spark Arrester Co., 135 In. 471, 35 N. E. 280, 22 L. R. A. 332. For the former case was bottomed upon the theory of conspiracy; while the latter case dealt not only with a false publication amounting to slander of title, but with threats toward divers and sundry others, and toward all who might buy or use the alleged patent-infringed article. Besides, the ultimate fact had been already ruled in a proper action, to-wit, that there was no infringement and therefore the alleged slanders of title which the court enjoined had beforehand (but in the same action) been found and declared to be false, and, therefore, as to title, slanderous.

It is stated in the Flint Case, supra, that after an action at law in which there is a verdict finding the statements published to be false, plaintiff, on an otherwise proper showing, could have injunction restraining any further publication of that which the jury has found to be actionable libel or slander, and of slanders or libel of a like or similar import. So say we in this case. If plaintiff had gone to a jury with this alleged libel and obtained a judgment, which, owing to the insolvency of defendant, he was unable to collect, further publication of a libel of like or similar import ought to be enjoined. Or, even if plaintiff had joined a count at law for damages for libel with a count for injunction on the theory of a threatened continuance of the false publication, and had alleged and proved, either the inadequacy of remedy by reason of the libeler's insolvency, or the legal necessity of the remedy sought in order to avoid a multiplicity of suits, the court nisi, upon a finding by the jury of the libel, and by the court of the said necessary facts on the equity side, could have enjoined continued publication thereof. Since, however, there is in the instant case neither conspiracy nor threats to others, nor a verdict of a jury upon the facts of libel, we are constrained to say that this judgment cannot stand.

Let it be reversed. All concur.

NOTE.—*Injunction Against Libel and Slander as Injurious to Life, Liberty and Pursuit of Happiness.*—The instant case appears to regard libel and slander only from a single standpoint. It is one thing to say that one has a constitutional right to a jury trial when he is charged with libel or slander and another thing to say that a chancellor cannot consider whether defamation by writing or words may not be shown in a purpose to injure one's reputation or property. In a suit at common law a jury trial is preserved by the constitution, but this does not prevent a court of equity from rendering a decree upon a common law right, if there be some situation presented that calls for equitable relief. In the instant case it was charged that defendant by verbal slanders and written libels was using them with the malicious intent to "destroy the reputation, business and professional standing and income of plaintiff."

It seems certain, or at least there is overwhelming authority that where there is a conspiracy to effect a certain purpose, injunction may issue against the use of verbal or written speech as a means of effectuating the purpose of the conspiracy. Gompers v. Buck Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 31 Sup. Ct. 492.

In Steinert & Sons Co. v. Tagen, 207 Mass. 394, 93 N. E. 584, 32 L. R. A. (N. S.) 1013, there was injunction granted against bearing a placard announcing the pendency of a strike against a business man long after a strike has ended by new employes being substituted and the old ones had found new employments. This was on the theory that the only purpose of the placards was to injure the business against which the strike had been declared. The court said: "This case does not come within the doctrine, that equity will not enjoin the publication of libel. There is here a wrongful act maliciously done, continuing and repeated every day, which, although it is not shown to have caused, as yet, any damage to the plaintiff, is manifestly intended to produce that result, is liable at any time in the future to do so and may cause real and substantial damage, of which it would certainly be difficult and might be impossible to prove either the existence or the quantum of the loss. It is like a boycott declared and maintained without cause. In such a case equity will give relief." It might really be immaterial whether the placards were libelous or not. Defendants were using them as written statements, that is to say, as verbal acts for an unlawful purpose.

In Collard v. Marshall (1892), 1 Ch. 571, 61 L. J. Ch., N. S. 268, it was held to be no unlawful restriction of the right of free speech to enjoin the publication of circulars and placards containing the alleged false statement that a strike was on, when such circulars and placards are injurious to plaintiff's business. These placards and circulars were looked on as merely means to an end.

In Jordahl v. Haydn, 1 Cal. App. 696, 82 Pac. 1079, where injunction was granted against the carrying of banners and placards and interfering with the business of a restaurant, it was said: "While the right of free speech is guaranteed to all citizens by the constitution, there is also guaranteed by that same constitution, the right of 'acquiring, possessing and protecting property and possessing and obtaining safety and happiness' and it is a maxim of jurisprudence prescribed by the statute law of this state, that 'one must so use his rights as not to infringe upon the rights of another.' * * *These guarantees are equally important to and equally necessary for the protection of all classes of citizens."

In Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809, the court said that while the right of free speech and to print and publish what one pleases is guaranteed by the constitution, yet there is also a guaranty of the right of an individual to carry on a lawful business in a lawful way, and every constitutional guaranty is subject to the limitation that a man pursuing a business or enjoying his rights shall always be bound by the restraints of law.

In Wilson v. Hey, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 13 A. & E. Ann. Cas. 82, it was held that the giving of notices to cease patronizing any establishment could be enjoined when their natural effect is to excite the fears of others and thereby effect a boycott so far as general custom is concerned. Members of a particular union could be notified that it was their interest not to patronize a particular establishment.

It seems to us that when the instant case states that injunction may issue where there has been a jury trial and a verdict of guilty has been rendered, it concedes, that libel is a something that may wrongfully interfere with one's constitutional right to carry on his business or protect his reputation or his property free from unlawful interference by another. As the California court intimates, why is one constitutional right less to be regarded than another? In many circumstances we know a speech or a writing is taken as an act, and it is not speech as speech that is enjoined, but it is speech as an act that brings or is reasonably calculated to bring, wrongful injury to one whose rights are unlawfully invaded. At all events, the books abound with decisions that labor unions may be enjoined from using written speech in furtherance of a boycott, and why there should be a discrimination against them that would not operate against others, it seems difficult to surmise. C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE PENNSYLVANIA BAR ASSOCIATION.

The annual meeting of the association will be held at the Bedford Springs Hotel, Bedford Springs, Pennsylvania, on Tuesday, Wednesday and Thursday, June 27, 28 and 29, 1916.

George B. Gordon, Esq., of Pittsburgh, will deliver the president's address on the afternoon of Tuesday, June 27th, at 2 o'clock. Subject, "Some Aspects of State Constitutional Law."

Professor Roscoe Pound, of the Law School of Harvard University, will deliver the annual honorary address the same evening, at 8 o'clock. Subject, "The Limits of Effective Legal Action."

A paper by Professor Francis H. Bohlen, of the Law School of the University of Pennsylvania, will be read on Wednesday evening, June 28th, at 8 o'clock. Subject, "Six Months' Experience Under the Workmen's Compensation System of Pennsylvania."

A paper by Richard Hay Hawkins, Esq., of Pittsburgh, will be read on Thursday morning, June 29th, at 10 o'clock. Subject, "Judicial Abuse."

The annual banquet will be held on Thursday, June 29th, at 7:30 p. m. George B. Gordon, Esq., the retiring president, will be the toastmaster. Responses to toasts are expected from His Excellency, the Governor of the Commonwealth of Pennsylvania, Professor Roscoe Pound, of the Law School of Harvard University, and others.

HUMOR OF THE LAW.

The destinies of a small Southern city, according to our correspondent, are presided over by a mayor, who first saw the light beneath the blue skies of the Emerald Isle. Under the city charter the mayor is ex-officio judge of the police court. Recently a prisoner was brought before His Honor, and the evidence developed a peculiar aggravated breach of the peace, so much so that His Honor became quite incensed at the prisoner.

"I fine you fifty dollars," said His Honor.

The prisoner smilingly produced a huge roll of bills, and with a bow counted off fifty dollars and laid the same on the magistrate's desk.

"And thirty days. See if ye have that in your pocket," then added His Honor.

The court clerk was examining an applicant for citizenship papers. Unfortunately, the clerk didn't ask his questions in the order in which the man from across the seas had been taught the answers.

"Do you speak English," asked the clerk.

"Sure, Mike!" was the answer.

"How long have you been in this country?"

"Michigan."

"How tall are you?"

"Forty years."

The clerk sighed. "I think you'd better get an interpreter," he said.

"That is my opinion. Twenty-five dollars, please."

"I got the same opinion from another lawyer and he charged me $5."

"Um. You had no confidence in him?"

"No—no."

"But you have in me?"

"Y-yes."

'Precisely. Our opinions are the same, but the difference in the cost is $20, and to have confidence in your case is well worth $20. This war in Europe is a terrible affair, is it not?"—St. Louis Post-Dispatch.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Action** — Joint and Several Liability.—Where two were jointly and severally liable on a promissory note, the holder may proceed against one in equity and the other at law.—Lewenstein v. Forman, Mass., 111 N. E. 962.

2. **Adoption**—Inheritance.—The act of adoption does not take away existing rights, or destroy the legal capacity to inherit from natural parents.—Head v. Leak, Ind. App., 111 N. E. 952.

3. **Adverse Possession** — Conveyance.—Mere expression of satisfaction with result of a survey showing one's fence is beyond his lot line, and agreement to move the fence, does not operate as a conveyance of the strip acquired by adverse possession.—Grim v. Johns, Ind. App., 112 N. E. 13.

4. **Attorney and Client**—Contract.—Where attorneys agreed to accept as compensation for services in foreclosing a mortgage one-half of such sum as defendant might recover, they are entitled to compensation in money and cannot be required to accept an interest in the land.—Donovan v Jenkins, Mont. 155 Pac. 972.

5.——Husband and Wife.—A wife whose husband contracted with an attorney to pay him 25 per cent of the proceeds of litigation touching community property, held bound by contract, though she did not sign it.—Thomas v. Scougale, Wash., 155 Pac. 847.

6.——Quantum Meruit.—In action by attorney on quantum meruit for professional services, it was error to strike out answer alleging special contracts on contingent fee basis and unsuccessful issue of litigation.—Freerks v. Nurnberg, N. D., 157 N. W. 119.

7. **Bankruptcy** — Custodia Legis. — Under Bankr. Act 1898, § 2, cl. 3, and section 38, held that property taken under process of a bankruptcy court is in custody of the law, and that the officer's possession cannot be disturbed by process from any state court.—Darrough v. First Nat. Bank of Claremore. Okla., 156 Pac. 191.

8.——Practice.—Under Bankr. Act, § 1 (16), and section 18d, and General Order No. 36 (89 Fed. xxxvi, 32 C. C. A. xxxvi), denial of adjudication, held not reviewable, where testimony was not in the transcript.—In re Murphy, U. S. C. C. A., 229 Fed. 988.

9.——Preference.—Facts held to show that, when defendant received payment of debts shortly before debtor's bankruptcy, he had reasonable cause to believe that he would receive a preference, and was acting for the purpose of procuring a preference.—Healy v. Wehrung, U. S. C. C. A., 229 Fed. 686.

10.——Preference.—The only elements required by the provisions of the Bankruptcy Act relating to preferences are the fact of insolvency at the time of the transfer and the excessive percentage of his debt acquired by the creditor in enforcing the transfer.—Rubenstein v. Lottow, Mass., 111 N. E. 973.

11.——Set-off.—Under Bankr. Act July 1, 1898, § 63a (1), and section 68, giving of check by one insolvent, but before adjudication, held an exercise by the parties of the right of set-off, so that the trustee could not recover the amount of the check from defendants, who had knowledge of the insolvency.—Putnam v. United States Trust Co., Mass., 111 N. E. 969.

12. **Banks and Banking**—Set-off.—The form in which set-off is accomplished as between banker and depositor is immaterial; it may be by the giving of check or by a direct method of bookkeeping.—Putnam v. United States Trust Co., Mass., 111 N. E. 969.

13. **Bills and Notes**—Law Merchant.—A provision of a note that all parties thereto might, by agreement, extend same held not to render the note nonnegotiable under the law merchant or the negotiable instruments law.—First Nat. Bank of Albuquerque v. Stover, N. M., 155 Pac. 905.

14.——Notice.—The maker of a note is entitled to make the same defenses against it in the hands of one not a holder in due course that he would be entitled to make it if it were in the hands of the original payee.—Douglass v. Brown, Okla., 155 Pac. 887.

15.——Notice.—Knowledge that a note was given for an executory agreement, broken and not performed, will prevent the indorsee from being a bona fide holder.—Barry v. Kniseley, Okla., 155 Pac. 1168.

16. **Brokers**—Commission.—Where a broker procured a purchaser ready, able, and willing to pay, but defendant was not able to give possession because the property was rented, the broker is entitled to his commission though the purchaser refused to buy.—Scott v. Ramey, Mo., App., 183 S. W. 656.

17. **Boundaries**—Adjoining Owners.—Where two adjoining owners, without regard to a division fence, asserted title as prescribed by law for the obtension of a title in fee by adverse possession, the estate so created is not affected by fact that fence marking limits of this adverse possession is proven not to be on true boundary line.—Corrigan v. Early, Mo., 183 S. W. 574.

18.——Monuments.—The rule that doubtful lines and corners must give way to the more certain courses or monuments called for in title papers does not apply, where the evidence leaves no room for doubt as to the location of the lines or monuments called for.—State v. Thompson, W. Va., 88 S. E. 381.

19. **Carriers of Goods**—Delay.—Consignor has right to bring action for delay in shipment of perishable goods without alleging ownership especially when declaration shows that consignee was to receive and sell goods for consignor.—Aultman v. Atlantic Coast Line R. Co., Fla., 71 So. 283.

20.——Initial Carrier.—An initial carrier is the one contracting with the shipper, and is not necessarily the one whose line constitutes the first link in transportation.—Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., N. D., 156 N. W. 1019.

21. **Carriers of Live Stock**—Delay.—In an action by shippers of live stock for delay in transit, alleging that the cattle should have reached destination on a given date, but did not, so that plaintiffs were compelled to hold them over for the next market, was insuffi-

cient as failing to allege when they arrived and why they were held over.—International & G. N. Ry. Co. v. Landa & Storey, Tex. Civ. App., 183 S. W. 384.

22. **Carriers of Passengers** — Relation.—A steamboat passenger who, after the boat had reached his destination, remained in the smoking room 30 minutes because his wife was elsewhere and "there was no use to go home," and also because he wished to talk to another passenger, thereby ceased to be a passenger.—Duval v. Inland Nav. Co., Wash., 155 Pac. 768.

23.——Trunk Check.—A baggage check is only prima facie evidence of the receipt of the trunk by the carrier, and this is true in the case of drummer's trunks.—Davis v. Atlantic Coast Line R. Co., S. C., 8 S. E. 273.

24. **Charities**—Validity of Bequest.—The devise and bequest of the residue of a testatrix's estate to a college to erect a main building and dormitory, and any balance to constitute a permanent fund for the college to be used in the same manner as the present permanent fund of such institution as directed by a named will, held valid.—McKnight v. Cage, Tex. Civ. App., 183 S. W. 854.

25. **Chattel Mortgages** — Default.—In conversion by a chattel mortgagor against the mortgagees, who took the property before default, the mortgagees were entitled to credit for an amount subsequently paid by them in discharging the mortgagor's note, of which they were accommodation makers; the mortgage having been given to secure them.—Miller v. Biggs, Mo. App., 183 S. W. 713.

26.——Future Advances.—While a mortgage to secure future advances up to the time of foreclosure is valid, such purpose must clearly appear from the instrument, and cannot be presumed where the mortgage does not contain a general description of the indebtedness so as to put one who examines it on notice.—Word v. Cole, Ark., 183 S. W. 757.

27.—Warehouseman.—A warehouseman, with notice of the mortgage, has no lien on the mortgaged goods stored with him by the mortgagor after default and without the consent of the mortgagee whose right to their possession became absolute upon default.—Schmidt v. Bekins Van & Storage Co. of San Francisco, Cal. App., 155 Pac. 647.

28. **Commerce**—Employes.—As a car engaged in interstate commerce lost its character as an interstate commerce car from the instant its cargo was discharged until the railroad by word or act manifested an intention to again use it, an employe, injured by the car while it was empty and awaiting orders, could not recover under the Federal Employers' Liability Act.—Moram v. Central R. Co. of New Jersey, N. J., 96 Atl. 1023.

29.——Employes.—Express messenger, injured while on defendant's interstate train, held engaged in interstate commerce.—Wesseler v. Great Northern Ry. Co., Wash., 155 Pac. 1063.

30.——Foreign Corporation.—A foreign corporation engaged in fraud is not engaged in interstate commerce so as to protect ts contract from annulment for failure to take out a license under St. 1915, § 1770b, to do business in the state.—Hamley v. Till, Wis., 156 N. W. 968.

31. **Contracts**—Public Policy.—A contract contemplating establishment and maintenance of a post office and providing for certain payments contingent thereon, held void as contrary to public policy, where the object sought was private advantage, rather than the interest of the general public.—Whitaker v. First Nat. Bank of Sapulpa, Okla., 155 Pac. 1175.

32. **Constitutional Law**—Due Process of Law.—The Commission Form of Government Act, conferring jurisdiction on the commissioners to try their own election contests, is not unconstitutional as denying due process of law, since an officer has no vested right in his office.—Lyons v. Becker, Ill., 111 N. E. 980.

33. **Corporations**—Equity.—A corporate creditor who has exhausted his legal remedies may sue in equity a stockholder who is indebted to the corporation on an unpaid stock subscription.—Llewellyn Iron Works v. Abbott Kinney Co., Cal., 155 Pac. 986.

34.——Estoppel. — Where a corporation's treasurer suffers corporate funds to be misappropriated by another officer,and does not account for funds coming into his own hands, he cannot, in an action brought against the corporation, recover for loans made or goods furnished by him, without showing the actual state of his account with the corporation.—Flanagan v. Flanagan Coal Co., W. Va., 88 S. E. 397.

35.——Officers.—The president of a foreign corporation, when within the state, can be served with process effectually against the corporation only where he is representing the corporation officially in its business.—Bagdon v. Philadelphia & Reading Coal & Iron Co., N. Y., 111 N. E. 1075.

36.——Ratification.—A company cannot, as against its manager, repudiate his unauthorized contract for advertising its business, but will be held to have ratified it, where for three months after knowledge, and while receiving benefits, its president allows payments thereon.—Carstens Packing Co. v. Lewis C. Troughton, Inc., Wash., 155 Pac. 758.

37.——Subscription.—False representations of an agent, taking subscriptions to the stock of a corporation to be organized, that plaintiff could give his note for the stock, and that it would be indefinitely extended, relating to a matter as to which agent had no authority, and which the corporation could not validly carry out, held to warrant rescission of the subscription.—General Bonding & Casualty Ins. Co. v. Mount, Tex. Civ. App., 183 S. W. 783.

38. **Covenants**—Restriction.—Mere nonuser or failure to assert a restriction in a deed does not defeat the restriction; but adverse use by the other party must be shown and in the absence of such evidence restrictions once established must be held to be still in force.—Hartt v. Rueter, Mass., 111 N. E. 1045.

39. **Curtesy**—Tenancy. — Where a husband had possession of his wife's lands, and she died, their son had no action for possession against his father, since the latter became tenant by the curtesy.—Powell v. Powell, Mo., 183 S. W. 625.

40. **Damages**—Measure of.—Where a building contract is substantially complied with, the building being adapted for its purpose, only slight additions or alterations being necessary, the measure of damages is the sum necessary to make it conform to the plans and specifications.—Gutov v. Clark, Mich., 157 N. W. 49.

41. **Deeds**—Construction.—Where clause in deed showed that "devert" was used in sense of "revert," and parties so understood it, the courts will so construe it.—Jakel v. Seeck, Ore., 155 Pac. 1192.

42.——Reacknowledgment.—Where a deed from husband and wife to an unmarried woman was changed, after delivery and acknowledgment, by the insertion, as grantee, of the person whom the unmarried woman married, reacknowledgment of such deed was a prerequisite to its being recordable.—Wagle v. Iowa State Bank, Iowa, 156 N. W. 991.

43. **Descent and Distribution**—Contract.—A contract by a son, in consideration of the present receipt of less than his proportionate share of the estate, to relinquish all claim against the estate, is binding.—Boyer v. Boyer, Ind. App., 111 N. E. 952.

44. **Divorce**—Admissions.—Answers to bill of divorce admitting that plaintiff had been a resident of Illinois "for many years last past" held as effective as an admission that she had been a resident more than one year continuously just before filing her bill, and to support a decree finding that the court had jurisdiction.—Lyons v. Lyons, Ill., 111 N. E. 977.

45.——Cruel Treatment.—The fact that the husband caught hold of his wife's arm and bruised it, and at the same time drew a knife and made her go back in the house, was not alone sufficient ground for her divorce on the ground of cruel and barbarous treatment such

as to endanger her life and render her condition intolerable.—Darrow v. Darrow, Ark., 183 S. W. 746.

46.——Tribal Laws.—A dissolution of an Indian marriage contract according to tribal laws and customs will be upheld, in the absense of a federal law invalidating such laws and customs. —James v. Adams, Okla., 155 Pac. 1121.

47. **Drains**—Benefit District.—Establishment of district conclusively establishes that all lands included will be benefited to amount found, that benefit exceeds cost, that district is a public improvement, that public welfare will be advanced, and that district is legal.—Ward v. Babcock, Wis., 156 N. W. 1007.

48. **Easements**—Implied.—Where the testator devised the family burying ground to one child, whose land abutted it and separated it from the road, a right of way thereto was necessarily implied.—Conover v. Cade, Ind. App., 112 N. E. 7.

49. **Elections** — Apportionment.—While the equality of representation in the government of a county need not be mathematically exact, the apportionment must, as near as practicable, be according to the population.—State v. Moorhead, Neb., 156 N. W. 1067.

50. **Electricity** — Proximate Cause. — Where lineman received shock from defectively insulated wire, whether electric company's negligence was the proximate cause of decedent's death is for the jury, though it was not shown whether death was caused by shock or fall.—Hockenberry v. New Castle Electric Co., Pa., 96 Atl. 1046.

51. **Eminent Domain** — Abutting Owner.—Generally a railroad may improve, repair, or change its roadbed, and raise or lower its grade, without liability to an abutting owner, unless the change is made in a negligent manner; the improvement not constituting an additional burden not included in the original appropriation.—Pittsburgh, C., C. & St. L. Ry. Co. v. Lamm, Ind. App., 112 N. E. 45.

52. **Estoppel**—Officers.—The mere fact that the majority stockholder was president of a corporation does not show that an estoppel available against the corporation.—Llewellyn Iron Works v. Abbott Kinney Co., Okla., 155 Pac. 986.

53. **Executors and Administrators**—Costs.—Costs of the administration of the estate of one named as beneficiary in a mutual benefit certificate who predeceased insured held not payable out of the proceeds in the hands of her administrator, who was also the administrator of the insured.—Sykes v. Armstrong, Miss., 71 So. 262.

54.——Reimbursement.—Where a husband's administrator was entitled as a matter of law to property in the hands of the wife's administrator, he could not make any agreement postponing the time for the payment of the debt, or provide by any agreement for reimbursement to the wife's estate.—Hammond v. United States Fidelity & Guaranty Co., Cal. App., 155 Pac. 1023.

55. **Fraud**—Action.—In action for damages for false representation that a horse sold plaintiff "was sound and all right," as far as defendant knew, it was necessary for plaintiff to show that defendant knew that the horse was not sound or was chargeable with such knowledge. —Kirk v. Trabue, Ind. App., 112 N. E. 26.

56. **Fraudulent Conveyances**—Homestead.—A widow's conveyance of her homestead to two daughters, in consideration of their taking care of her during her last sickness, held not to have been made with intent to defraud creditors, or other adult children, where she was not aware of claims filed against her estate by them and allowed.—Scott v. Rodgers, Kan., 155 Pac. 961.

57.——Preference.—There is no fraud at common law about a debtor's transfer of property to his creditor not exceeding in value the amount of the debt, even though a preference of one creditor over another thereby results.—Rubenstein v. Lottow, Mass., 111 N. E. 973.

58. **Highways**—Ordinary Care.—In determining the degree of care required in the operation of an automobile, the speed of the machine, its size, appearance, manner of movement, danger of operating it, and the like will be considered. —White v. Rukes, Okla., 155 Pac. 1184.

59.——Prescription.—That the public might acquire a prescriptive right to a road, it was not essential that the county do work on the road where work was not needed to keep the road in repair or put it in condition for travel. —State v. Berg, Iowa, 155 Pac. 968.

60. **Homestead**—Alienation.—While husband cannot alienate or burden homestead without wife's joinder, he may sell land subject to all homestead and dower rights of nonjoining wife. —Stephens v. Stephens, Mo., 183 S. W. 572.

61. **Insurance**—Double Indemnity.—To entitle insured to double indemnity for an injury received while he was a passenger, it was not essential under the policy that the accident should have resulted from the operation or construction of the carrier's conveyance.—American Fidelity Co. of Montpelier, Vt., v. Echols, Okla., 155 Pac. 1160.

62. **Interest**—Unliquidated Damages.—Interest cannot be recovered on unliquidated damages where a judgment on verdict is essential to the ascertainment of the amount of same.—City of Chickasha v. Hollingsworth, Okla., 155 Pac. 859.

63. **Insurance**—Vested Interest.—The beneficiary in a mutual benefit policy has no vested interest in it during the life of the insured, so that the proceeds were no part of the estate of the beneficiary of the insured, who had predeceased him.—Sykes v. Armstrong, Miss., 71 So. 262.

64. **Intoxicating Liquors**—Damages.—A licensed saloon keeper held liable to the wife and children of deceased, constituting one family, for all damages to their means of support from sales of intoxicating liquors by defendant.—Bergmann v. Koehn, Neb., 156 N. W. 1040.

65. **Landlord and Tenant**—Covenants.—The lessors of store premises, who covenanted in the lease not to sell certain lines of goods in competition with the lessee, did not violate such agreement by selling such goods in competition with the corporation which the lessee had formed to take over his business and of which he was manager and chief owner.—Thresher v. Simpson, Mass., 111 N. E. 1035.

66.——Independent Contractor.—A landlord is not liable for the negligence of an independent contractor, where such contractor is competent, and the landlord is not negligent in selecting him.—S. W. Noggle Wholesale & Mfg. Co. v. Sellers & Marquis Roofing Co., Mo. App., 183 S. W. 659.

67. **Mandamus**—Discretion.—The allowance of an order to show cause, on petition for mandamus, is not a matter of right, and may be denied where the petition fails to state facts entitling petitioner, to the writ.—Anker v. Board of Sup'rs of Iosco County, Mich., 157 N. W. 18.

68. **Marriage**—Presumption.—Where a man and woman have been living together as husband and wife for several years and it appears that at the time of marriage the man's former wife was living, it will be presumed that there was a legal dissolution of the former marriage.—James v. Adams, Okla., 155 Pac. 1121.

69. **Master and Servant**—Accident.—Injury to customer returning defective hammer which defendant's clerk struck violently with a testing hammer, causing a piece of steel to strike the customer, held not a pure accident, but one which should have been foreseen.—Mast v. Borneman & Sons, Ind. App., 111 N. E. 949.

70.——Course of Employment.—Where a herder in defendant's employ stole and drove into defendant's herd the sheep of another, held that the larceny was not in the "course of employment," and that a judgment against defendant could not be sustained, in the absence of evidence showing ratification or acceptance of benefits.—Bruton v. Sakariason, N. M., 155 Pac. 725.

71.——Verdict.—A general verdict in an action under the Federal Employers' Liability Act for wrongful death will be set aside, where the

jury declare in one finding that the accident would have happened though decedent had not been negligent, and in another that his negligence contributed to it, and it does not appear that any deduction was made on that account.—Pyles v. Atchison, T. & S. F. Ry. Co., Kan., 155 Pac. 788.

72. **Mechanics' Liens** — Subcontractor.—The failure of the contractor to complete his contract does not of itself defeat the rights of the subcontractors to their liens, and they are entitled to protection for what they have done or furnished under the contract.—Zilz v. Wilcox, Mich., 157 N. W. 77.

73. **Mortgages** — Equitable Interest. — The purchaser of the equitable interest of the mortgagee of a part owner of timber lands standing in the name of a timber company purchased at his peril, acquiring the property burdened with every prior equity, more especially where the purchase was under judicial sale.—Thomas v. Scougale, Wash., 155 Pac. 847.

74.——Nonsuit.—A foreclosure of a mortgage under a power of sale will not be treated as a continuation of a previous action to foreclose in which the mortgagee submitted to a voluntary nonsuit.—Corey v. Hooker, N. C., 88 S. E. 236.

75. **Municipal Corporations** — Discretion. — Where legislative or discretionary powers are conferred upon municipal corporations, the courts will not interfere unless in the exercise of such discretion there is fraud, manifest oppression, or gross abuse.—Morteli v. Clark, Ill., 111 N. E. 993.

76.——Respondeat Superior.—Where a pedestrian was injured by an automobile operated by one who had just bought it, the dealer who sold the car was not liable, though a mechanic furnished by him was in the car merely to observe its operation without interfering with or instructing as to its management.—Keck v. Jones, Kan., 155 Pac. 950.

77. **Navigable Waters**—Public Highway.—A river in fact navigable though very little used for navigable and largely used for other purposes is nevertheless a public highway.—Bissell Chilled Plow Works v. South Bend Mfg. Co., Ind. App., 111 N. E. 932.

78. **Negligence** — Imputability. — The negligence of the driver of a motorcycle is not imputed to his invited guest who was riding on the rear seat thereof.—Sanders v. Taber, Ore., 155 Pac. 1194.

79.——Manufacturer.—In order to make the manufacturer liable for defects in goods sold, he must have knowledge that in the usual course of events the danger will be shared by others than the buyer, although mere knowledge alone is insufficient to create liability.—MacPherson v. Buick Motor Co., N. Y., 111 N. E. 1050.

80. **Partition**—Counsel Fees.—In a partition suit, no allowance should be made counsel for their services in contested matters between the parties in partition.—Parrish v. Treadway, Mo., 183 S. W. 580.

81. **Partnership**—Action.—Action at law between partners upon a claim growing out of a partnership transaction will not lie until the business is wound up and accounts settled.—Li Sai Cheuk v. Lee Lung, Ore., 156 Pac. 254.

82. **Patents**—Dismissal of Action.—Where, though expense had been incurred in taking testimony and in other ways, evidence in patent suit was not closed, plaintiffs still had right to dismiss.—E. G. Staude Mfg. Co. v. Labombarde, U. S. D. C., 229 Fed. 1004.

83.——Estoppel.—A corporation formed to manufacture a device alleged to infringe patents granted to and assigned by one of the incorporators held bound by any estoppel which bound him.—Crown Cork & Seal Co. of Baltimore City v. Carper Automatic Bottling Mach Co. of Baltimore City, U. S. D. C., 229 Fed. 743.

84.——Novelty.—In approaching the consideration of the patentable novelty of an article of wearing apparel, it is well, in a doubtful case, to weigh cautiously the influence of commercial utility.—Epstein v. Dryfoos, U. S. D. C., 229 Fed. 756.

85.——Priority of Invention.—Whether an alleged anticipating patent was a part of the prior art depends, not on priority of invention, but on whether the invention of the later patent was made prior to the issue of the first patent.—Miner v. T. H. Symington Co., U. S. C. C. A., 229 Fed. 730.

86. **Pawnbrokers**—Conversion.—Pawnbroker, who loaned money to plaintiff's agent on ring belonging to plaintiff and refused to return it to plaintiff on his demand, held liable as a bailee for conversion, although he might have returned the ring to the agent before demand by plaintiff.—Schmeltz v. Morino, Mo. App., 183 S. W. 666.

87. **Principal and Agent**—Accounting.—In the absence of an express agreement to the contrary, advancements made by an agent for his principal's benefit to carry out the agency are items of the account between them, and not contract loans or debts.—Flanagan v. Flanagan Coal Co., W. Va., 88 S. E. 400.

88.——Dismissal of Action.—Under the statute permitting all parties in interest to be made parties, an action against an agent for money received should not be dismissed on his pleading that the principal should be made a party defendant.—Jensen v. Miller, Wis., 156 N. W. 1010.

89.——Ratification.—Where a sales agent had no authority to make waranties other than those contained in the written contract signed by the purchaser, which declared that it should contain all of the agreements between the parties, a parol warranty by the sales agent is not binding, unless ratified by the seller.—First Nat. Bank of Garner, Iowa, v. Smith, Tex. Civ. App., 183 S. W. 862.

90.——Rescission.—Where goods to be sold on commission are defective in materials and workmanship, that alone is sufficient to justify rescission by the selling agent.—Kennedy v. Meilicke Calculator Co., Wash., 155 Pac. 1043.

91. **Railroads**—Adjacent Owner.—Where a railroad constructs an embankment to raise its road, so that clay is washed therefrom onto the lawn of an adjacent owner, recovery may be had therefor.—Pittsburgh, C., C. & St. L. Ry. Co. v. Lamm, Ind. App., 112 N. E. 45.

92.——Crossing Accident.—Plaintiff, who was driving and intestate, accompanying him, were negligent in going on a railroad track, without stopping, looking, or listening, though the gates were not lowered and no warning was given.—Southern Ry. Co. v. Jones' Adm'r., Va., 88 S. E. 178.

93.——Look and Listen.—Motorists were negligent barring recovery for injuries resulting from a collision, where they failed to look and listen for trains, if by stopping before reaching the tracks they could have seen an approaching train and avoided injury.—Washington & O. D. Ry. v. Zell's Adm'x., Va., 88 S. E. 309.

94.——Negligence.—In an action against a railroad for injury from falling over a stake, defendant, engaged in changing the grade of a private street or way, even if the stake was on the line of an old fence on private land but made the use of the sidewalk dangerous, could be found to be negligent.—Coles v. Boston & M. R. R., Mass., 111 N. E. 893.

95.——Presumption.—Under the statute, excepting the yard, garden, dwelling house, and graveyard of an owner from acquisition by a railroad for a right of way, in the absence of consent, the railroad cannot acquire the land by presumptive consent from lapse of time.—Atlantic Coast Line R. Co. v. Dawes, S. C., 88 S. E. 286.

96. **Release**—Fraud.—A release of a personal injury claim, procured by fraudulent representations of the defendant railroad company's doctor that the injuries were slight and temporary, held not binding where the injuries proved to be serious and permanent.—Ladd v. Chicago, R. I. & P. Ry. Co., Kan., 155 Pac. 943.

97. **Remainders**—Contingent Interest.—Where land was deeded for the use and benefit of one named and the heirs of her body, and a child

of the beneficiary died before she did, and such child left heirs, a prior deed from such child conveyed no interest as against grandchildren.—Parrish v. Treadway, Mo., 183 S. W. 580.

98. **Sales**—Acceptance.—Where the seller of raisins established that they were delivered in time and were of the specified grade, acceptance was made out unless the evidence showed that the seller admitted they were not of grade and agreed to adjust the matter on that basis.—Bronge v. Mowat & Co., Cal. App., 155 Pac. 827.

99.——Waranty.—Where a contract for the delivery of "48 hour furnace coke" provided that it should be canceled if the quality of the coke should deteriorate from that shipped during the first one or two months, the trade meaning of the words "48 hour furnace coke" not being established, there was no waranty of the quality of the coke to be delivered during the first one or two months.—Federal Coal & Coke Co. v. Coryell, Mass., 111 N. E. 1041.

100. **Specific Performance** — Action.—Where demand was made on the vendor for a deed only a week before his death, and he put off the vendee on a plea of his physical condition, a suit brought against the vendor's administratrix soon after his death to enforce specific performance was brought with reasonable promptness.—Harvey v. Hayes, Fla., 71 So. 282.

101.——Equity.—Specific performance of a contract to purchase land will not be denied because the buyers had collected a note they agreed to assign to the vendors; for a court of equity will follow the proceeds of the note and compel delivery thereof to the vendors.—Larrabee v. Bjorkman, Ore., 155 Pac. 974.

102. **Street Railroads**—Contributory Negligence.—Where plaintiff, after alighting from an automobile which got out of order on the tracks, went back into the machine, though she knew that a street car which her chauffeur had gone to stop, was about due, she was guilty of contributory negligence.—Coleman v. Pittsburgh, H., B. & N. C. St. Ry. Co., Pa., 96 Atl. 1051.

103. **Taxation**—Levy.—While the term "levy" as referring to executive officers means the taking of property into the possession or control of the officer, taxes are deemed to be levied when the assessments are made and amounts determined.—Mann v. Allen, N. C., 88 S. E. 235.

104.——Purpose.—The legislative determination as to what constitutes a "county purpose" for which taxes may be assessed will not be made ineffectual by the courts, unless some constitutional provision is violated, or the particular enactment can have no legal or practical relation to any county purpose.—Stewart v. De Land-Lake Helen Special Road and Bridge Dist. in Volusia County, Fla., 71 So. 42.

105. **Telegraphs and Telephones**—Franchise.—An incorporated telephone company may sell its property rights, franchises, and privileges, in whole or in part, to another company.—Michigan Independent Telephone & Traffic Ass'n. v. Michigan Railroad Commission, Mich., 157 N. W. 52.

106. **Theaters and Shows**—Concessionary.—The general amusement concessionary from a state fair association, who had control of the amusements on the grounds and their selection, was under duty to the patrons of an amusement device, the privilege to operate which he leased to a subconcessionary for a percentage of receipts, to use reasonable care to keep the equipment reasonably safe.—Hartman v. Tennessee State Fair Ass'n, Tenn., 183 S. W. 733.

107.——Negligence.—Proprietor of amusement park held not relieved of liability for injuries by fact that accident was due to negligence of concessioners or their employes.—Whyte v. Idora Park Co., Cal. App., 155 Pac. 1018.

108.——Ordinary Care.—One operating an amusement device at a state fair, which carried passengers, owed to them the degree of care which a common carrier of passengers must exercise.—Tennessee State Fair Ass'n v. Hartman, Tenn., 183 S. W. 735.

109.——Public Utility.—Under the common law, a theater is in no sense public property nor governed by the rule relative to public utilities and the proprietor's right to and control of it, and he may admit or exclude persons at his pleasure.—Woollcott v. Shubert, N. Y., 111 N. E. 829, 217 N. Y. 212.

110. **Trusts**—Resulting Trust.—Where, without any administration, the widow takes the money of deceased and invests it in land, taking title in her name, there is a resulting trust in favor of the child to the extent of its interest in the money.—Walker v. Taylor, S. C., 88 S. E. 300.

111. **Use and Occupation**—Rental Value.—Testator's daughter, who claimed no title to his house, which she refused to give up to the executors upon demand, held liable to them for the fair rental value.—Sherwood v. McLaurin, S. C., 88 S. E. 363.

112. **Vendor and Purchaser**—Growing Crops.—Where a purchaser fails to make payments, and in compliance with his vendor's request moves off the property, abandoning his contract, he is not entitled to the crops growing on the premises when he leaves them.—Wensler v. Tilke, Kan., 155 Pac. 946.

113.——Rescission.—Misrepresentations as to the location of land entitle a person acquiring the land, relying on the statements, to rescind and recover the price paid.—Wilson v. Robinson, N. M., 155 Pac. 732.

114.——Rescission.—One purchasing land containing an orchard under an agreement that it was planted with a certain variety of trees may rescind if it was actually planted with a different variety, notwithstanding there was no difference in the value of the trees.—McGowan v. Willamette Valley Irrigated Land Co., Ore., 155 Pac. 705.

115. **Waters and Water Courses**—Contract.—Where defendant agreed to furnish plaintiff sufficient water to grow his rice crop on land rented from defendant, without reservation in the contract excusing defendant for failure to furnish sufficient water in case of drought, the contract providing for damages if the water supply was insufficient, the defendant was liable, in spite of the fact that an unusual drought caused a deficiency in the water supply.—Northern Irr. Co. v. Watkins, Tex. Civ. App., 183 S. W. 431.

116.——Prior Appropriator.—In absence of statutory regulation to the contrary, the prior right of appropriation of water rights belongs to the company which first defines and marks its route.—Carolina-Tennessee Power Co. v. Hiawassee River Power Co., N. C., 88 S. E. 349.

117. **Wills**—Attesting Witness.—That the two attesting witnesses were not in complete harmony as to what was said and done, and were doubtful as to their recollection of what testator said and as to whether he signed in the presence of witnesses or acknowledged the instrument to be his will to them, held not to show that the will was not duly executed.—In re Ballard's Estate, Okla., 155 Pac. 894.

118.——Directory Provision.—Where a will devised sums "in trust, the income to be used for preservation of a monument and to care for the lot in the cemetery, * * * but the town not to expend a greater sum than 4 per cent per annum," the trustee need not adopt or conform to the standard of taste of the particular cemetery, the direction of the will being authoritative and explicit.—McCoy v. Town of Natick, Mass., 111 N. E. 874.

119.——Interest.—Interest by way of accretion would be added to that part of an ordinary pecuniary legacy that remained unpaid at the expiration of one year from the testator's death.—Gilbert v. Bachelder, Mass., 111 N. E. 956.

120.——Specific Legacy.—Where testator, after making specific bequests included a provision, "Of the balance or remainder of my property * * * I give, devise and bequeath to my wife, * * *" the mere use of the word "of," although grammatically construed, it would create an ambiguity, did not defeat the bequest of the entire residuary estate to the wife.—Philbrook v. Randall, Me., 96 Atl. 725.